

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUN 16 2003

In the Matter of)
)
GLOBAL CROSSING, LTD.)
(Debtor-in-Possession), Transferor,)
)
and)
)
GC ACQUISITION LIMITED,)
Transferee)
)
Application for Consent to Transfer)
Control and Petition for)
Declaratory Ruling)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IB Docket No. 02-286

File Nos. ISP-PDR-20020822-0029,
et al.

PETITION TO DISMISS OR DENY
AND OPPOSITION TO
PETITION FOR DECLARATORY RULING

IDT CORPORATION

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June 16, 2003

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AND OPPOSITION TO
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IDT Corporation ("IDT"),¹ by its attorneys and pursuant to the Commission's May 16, 2003 *Public Notice*,² hereby petitions to dismiss or deny the above-referenced applications, as amended May 13, 2003,³ seeking consent to transfer control of licensed subsidiaries of Global

¹ IDT, through its IDT Telecom, Inc. subsidiary, is a facilities-based, multinational carrier that provides a broad range of telecommunications services to its retail and wholesale customers worldwide. IDT Telecom, by means of its own national telecommunications backbone and fiber optic network and infrastructure, provides its customers with integrated and competitively priced international and domestic long distance telephony and prepaid calling cards. IDT subsidiary IDT Solutions provides broadband and telephony services to commercial and governmental customers through a fixed wireless and fiber infrastructure. IDT subsidiary Net2Phone, Inc. is a leading provider of high quality global retail voice over IP services.

² *Public Notice*, DA 03-1724, Global Crossing Ltd. and GC Acquisition Limited File May 13, 2003 Amendment to Applications (rel. May 16, 2003).

³ IB Docket No. 02-286, Third Amendment to Application for Consent to Transfer Control and Petition for Declaratory Ruling and Request for Expedited Treatment, May 13, 2003 ("Third Amendment").

Crossing Ltd., Debtor-in-Possession (“GX”) to GC Acquisition Limited (“New GX” and, together with GX, the “Applicants”). IDT also herein opposes the relief requested in the Applicants’ Petition for Declaratory Ruling, as amended May 13, 2003 (the “Petition”),⁴ seeking approval for a proposed controlling ownership in New GX by Singapore Technologies Telemedia Pte Ltd (“ST Telemedia”) and its affiliates.

I. INTRODUCTION AND SUMMARY

The Applicants originally proposed that the Government of Singapore, through intermediary corporations, would acquire a minority equity stake in New GX. The Third Amendment describes a fundamentally new transaction: the Government of Singapore, through ST Telemedia and foreign telecommunications carriers possessing substantial market power, would acquire control of New GX and of Commission certificates, cable landing licenses, and radio licenses held by subsidiaries of GX. The proposed level of foreign government control compels *de novo* review of the new transaction by the Commission.

The present record in this docket demonstrates that certain aspects of the proposed transfers are prohibited by the Communications Act of 1934, as amended (the “Act”). To the extent the New Transaction would result in *de facto* and *de jure* control of Title III licenses by a foreign government or its representative, Section 310(a) of the Act is controlling, and prohibits such transactions.

To the extent that Section 310(b)(4) of the Act applies to the new transaction described in the Third Amendment, the Applicants cannot benefit from the presumption adopted in the

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See id.

Commission's *Foreign Participation Order*, but are required to affirmatively prove that the transfer of control to a foreign government and its affiliates will promote the public interest and enhance competition. Their assertions that they have met this burden are not supported by the record.

ST Telemedia and its affiliates dominate substantial portions of the Southeast Asian telecommunications market; the acquisition by ST Telemedia of control of the GX subsidiaries' licenses and assets could substantially harm competition by concentrating the ownership of those assets, including undersea cable systems interconnecting the U.S. and Southeast Asia, and creating a substantial risk of anticompetitive effects and diminished competition. Furthermore, at least one ST Telemedia affiliate already is engaged in anticompetitive behavior, imposing unjustifiably high traffic termination rates on competitors.

Although the Applicants promise that ST Telemedia ultimately will become autonomous from foreign government control, the record contains no evidence that divestiture is imminent, or even certain. The record also does not reveal how substantial national security and law enforcement concerns will be resolved. The Commission also should take into consideration GX's substantial non-regulated assets.

In sum, substantial public interest considerations dictate that the applications should be denied or dismissed because the new transaction threatens the competitive nature of world telecommunications markets and raises substantial national security and law enforcement concerns that cannot be resolved on the present record. In any event, no action should be taken on the applications unless and until the Applicants have provided additional information demonstrating that the transaction proposed in the Third Amendment serves the public interest and other issues raised by the Third Amendment have been resolved.

II. THE NEW TRANSACTION REQUIRES THE HIGHEST LEVEL OF SCRUTINY

The Third Amendment describes a new and substantially different transaction than the transaction described in the applications as originally filed (the “Original Transaction”). The proposed acquisition of control of New GX by ST Telemedia and its affiliates described in the Third Amendment (the “New Transaction”) raises fundamentally different issues than did ST Telemedia’s qualifications to hold a minority investment in New GX, as contemplated by the Original Transaction.

Because the Third Amendment announces a change in control of the proposed transferee, it constitutes a major amendment to the applications.⁵ Notwithstanding this fact, nowhere does the Third Amendment acknowledge that the Applicants have proposed a major change. Instead, the Applicants have asked the Commission to expedite its consideration of the New Transaction, simply because, they assert, “the ability of ST Telemedia to assume the investment of [Hutchison Telecom] was contemplated in the Purchase Agreement,” and no party “has raised substantive issues regarding ST Telemedia.”⁶ To the Applicants, the Third Amendment “merely result[s] in one of the original investors increasing its proposed shareholding.”⁷

However, contrary to the Applicants’ assertions, it is exactly because the nature, structure, ownership and control of New GX, the proposed transferee, have substantially changed that the Commission’s statutory and public interest analyses of the proposed transfer also must

⁵ The Act and the Commission’s rules are clear that a change in proposed control constitutes a major amendment to a pending application. 47 U.S.C. §§ 214, 309(b); 47 C.F.R. §§ 63.24(c), 63.52(b), 1.927(h), 1.929(a)(2).

⁶ Third Amendment at 2-3.

⁷ *Id.* at 3, n.5.

change. *De novo* review by the Commission of the Third Amendment is necessary because the newly proposed transfer of control of cable landing licenses and other critical infrastructure to a single party, ST Telemedia, the wholly-owned affiliate of dominant foreign carriers that in turn are wholly owned by a foreign government, raises substantive questions of fact and law which interested parties have not previously been afforded an opportunity to address, and which cannot be resolved by information previously filed.

The Commission correctly rejected the Applicants' request for expedited consideration of the New Transaction. The New Transaction requires the highest level of Commission scrutiny to determine whether the proposed control by ST Telemedia and its affiliates is consistent with applicable law, and whether the transaction is in the public interest.

III. DESCRIPTION AND HISTORY OF THE PROPOSED TRANSACTIONS

The Original Transaction. On August 22, 2002, the Applicants filed with the Commission (1) an Application for Consent to Transfer Control and Petition for Declaratory Ruling, requesting approval to transfer control of certain FCC-licensed subsidiaries of GX to New GX, and also seeking a declaratory ruling that the proposed ownership interests in Global Crossing North American Networks, Inc. by Hutchison Telecommunications Limited ("Hutchison") and ST Telemedia would be in the public interest under Section 310(b)(4) of the Act (the "Original Petition");⁸ (2) an Application to Transfer Control of International and Domestic Section 214 Subsidiaries of GX from GX to New GX, pursuant to Sections 63.04(b)

⁸

The Petition was assigned FCC File No. ISP-PDR-20020822-00029.

and 63.18 of the Commission's rules (the "Section 214 Transfer Application");⁹ (3) an Application to Transfer Control of Submarine Cable Landing Licensees from GX to New GX, pursuant to Section 1.767 of the Commission's rules and the Cable Landing Act¹⁰ (the "Cable Landing License Transfer Application");¹¹ and (4) an Application for Transfer of Control of common carrier and non-common carrier wireless licenses from GX to New GX, pursuant to Section 1.948 of the Commission's rules (the "Wireless License Transfer Application").¹² (The Petition, the Section 214 Transfer Application, the Cable Landing License Transfer Application, and the Wireless License Transfer Application are hereinafter referred to collectively as the "Original Application".)

⁹

The Section 214 Transfer Application was assigned FCC File Nos. ITC-T/C-20020822-00443 (for an authorization held by Global Crossing Bandwidth, Inc. (Debtor-in-Possession)), ITC-T/C-20020822-00444 (for an authorization held by Global Crossing Government Markets USA, Inc. (Debtor-in-Possession)), ITC-T/C-20020822-00445 (for an authorization held by Global Crossing Holdings USA, Inc. (Debtor-in-Possession)), ITC-T/C-20020822-00446 (for authorizations held by Global Crossing North American Networks, Inc. (Debtor-in-Possession)), ITC-T/C-20020822-00447 (for authorizations held by Global Crossing Telecommunications, Inc. (Debtor-in-Possession)), ITC-T/C-20020822-00449 (for an authorization held by Racal Telecommunications Inc.), and ITC-T/C-20020822-00448 (for an authorization held by International Optical Networks, L.L.C.). No file numbers were assigned to the request to transfer control of Domestic Section 214 authority held by GX affiliates Budget Call Long Distance, Inc. (Debtor-in-Possession), Global Crossing Bandwidth, Inc. (Debtor-in-Possession), Global Crossing Local Services, Inc. (Debtor-in-Possession), Global Crossing North American Networks, Inc. (Debtor-in-Possession), and Global Crossing Telecommunications, Inc. (Debtor-in-Possession).

¹⁰

An Act Relating to the Landing and Operation of Submarine Cables in the United States, 47 U.S.C. §§ 34-39.

¹¹

The Cable Landing License Transfer Application was assigned FCC File Nos. SCL-T/C-20020822-00068 (for the Atlantic Crossing Cable license held by GT Landing Corp. (Debtor-in-Possession)), SCL-T/C-20020822-00070 (for the Japan-U.S. Cable license held by Global Crossing Telecommunications, Inc. (Debtor-in-Possession)), SCL-T/C-20020822-00071 (for the Mid-Atlantic Crossing Cable license held by MAC Landing Corp. (Debtor-in-Possession)), SCL-T/C-20020822-00072 (for the Pan American Crossing Cable license held by PAC Landing Corp. (Debtor-in-Possession)), SCL-T/C-20020822-00073 (for the South American Crossing Cable license held by Global Crossing Latin America & Caribbean Co. (Debtor-in-Possession)), and SCL-T/C-20020822-00074 (for the Asia Direct Cable, Atlantic Express I and I Cables, Bahamas Express Cable, Guam-Hawaii Cable, Hawaii Express Cable, and Orient Express Cable licenses held by GC Pacific Landing Corp. (Debtor-in-Possession)), and SCL-T/C-20020822-00075 (for the Atlantic Crossing 2 Cable license held by GT Landing II Corp. (Debtor-in-Possession)), and SCL-T/C-20020822-00077 (for the Pacific Crossing Cable license held by PC Landing Corp. (Debtor-in-Possession)).

¹²

The Wireless License Transfer Application was assigned FCC File No. 0001001014 (for 27 licenses held by Global Crossing North American Networks, Inc. (Debtor-in-Possession)).

As the record in this docket shows, the Original Application followed approval by the Bankruptcy Court of an August 9, 2002 Purchase Agreement between GX and its parent Global Crossing Holdings Ltd. (“GX Holdings”), ST Telemedia, Hutchison Telecommunications Limited (“Hutchison”), and the Joint Provisional Liquidators of GX and GX Holdings, by which Hutchison and ST Telemedia agreed to pay \$250 million for 61.5% of the equity and voting interests in a newly-formed company (New GX), to which GX and GX Holdings agreed to transfer substantially all of their assets. Hutchison and ST Telemedia also had entered into an August 9, 2002 Shareholder Agreement, pursuant to which each of Hutchison and ST Telemedia would acquire 30.75% of the equity of New GX.¹³ The Original Application sought approval to proceed with this transaction and the resulting transfer of control of GX’s licensed subsidiaries, and also sought authority to issue up to an additional 25% equity and/or voting interests in New GX to non-U.S. investors other than Hutchison Telecom and ST Telemedia.¹⁴

On December 4, 2002, the Commission requested substantial additional information – the first of numerous such written and oral requests necessitated by the Applicants’ inability or unwillingness to provide complete and current information about the proposed new owners and related matters – about nearly every aspect of the proposed transaction, including the bankruptcy court proceedings, corporate status and organization of the proposed transferee, ownership,

¹³ See Original Application at 7.

¹⁴ *Id.* at 26.

foreign ownership, and market power.¹⁵ The Applicants also amended the Original Application twice prior to filing the Third Amendment.¹⁶

On February 14, 2003, the International Bureau announced that the 180-day processing clock was stopped, effective immediately, at day 149, until the Commission received and analyzed the amended applications and other information requested by the Staff.¹⁷ The processing clock for the Original Transaction remained stopped at day 149.¹⁸

On April 30, 2003, the Applicants notified the Commission that Hutchison had withdrawn from the Purchase Agreement, that ST Telemedia would assume Hutchison's rights and obligations under that Agreement, and that Applicants "anticipate that they will make an appropriate filing with respect to the pending Application ... in the near future."¹⁹

The New Transaction. On May 13, 2003, the Applicants filed the Third Amendment, which reflects Hutchison's withdrawal as an investor in New GX, with the result that ST Telemedia has assumed Hutchison Telecom's rights and obligations under the Purchase

¹⁵ See IB Docket No. 02-286, Letter from J. Ball, Chief, Policy Division, International Bureau, to A. Lipman, Counsel to Applicants, December 4, 2002; Letter from J. Ball to A. Lipman, January 23, 2003; Letter from J. Ball to A. Lipman, February 14, 2003.

¹⁶ The First Amendment, filed February 13, 2003, provided new foreign affiliation information in connection with the pending Section 214 Transfer Application and Cable Landing License Transfer Application. The amendment stated that due to (1) the acquisition on December 20, 2002, by Indonesia Communications Limited, a subsidiary of ST Telemedia, in PT Indonesian Satellite Corporation ("Indosat") and (2) the acquisition on December 20, 2002 of control of Indosat by ST Telemedia, Indosat would be a foreign affiliate of New GX upon consummation. IB Docket No. 02-286, Amendment to Application for Consent to Transfer Control and Petition for Declaratory Ruling, February 13, 2003. The Second Amendment, filed April 7, 2003, provided updated information based on discussions with the Committee on Foreign Investment in the United States with respect to national security and law enforcement issues raised by the transaction. To address such concerns, Hutchison committed to appoint U.S. resident citizen proxy holders who would exercise its voting and corporate governance rights. IB Docket No. 02-286, Second Amendment to Application for Consent to Transfer Control and Petition for Declaratory Ruling, April 7, 2003.

¹⁷ IB Docket No. 02-286, Letter from J. Ball to A. Lipman, February 14, 2003.

¹⁸ See IB Docket No. 02-286, Letter from J. Ball to A. Lipman, March 27, 2003.

¹⁹ IB Docket No. 02-286, Letter from P. Gagnier, Counsel to Applicants, April 30, 2003.

Agreement.²⁰ Thus, the name of the proposed transferee and parent of all of GX's FCC-licensed subsidiaries will remain GC Acquisition Ltd., a Bermuda company – New GX – but the ownership of New GX will be substantially different: specifically, common and preferred stock equal to 61.5% of the equity and voting interests in New GX will be held by Mauritius Company, a company organized under the laws of Mauritius.²¹ Mauritius Company in turn would be owned 100% by STT Communications Limited,²² which in turn would be a wholly-owned subsidiary of ST Telemedia, which is a wholly-owned subsidiary of Singapore Technologies Pte Ltd. (“Singapore Technologies”), a wholly-owned subsidiary of Temasek Holding (Private) Limited (“Temasek”),²³ which is wholly owned by the Government of Singapore.²⁴ The remaining 38.5% of the equity and voting interests will be owned by the pre-petition creditors of GX and its debtor subsidiaries (the “Creditors”).²⁵ The Applicants also ask the Commission to authorize New GX to accept equity or voting interests up to an additional 25% from “non-US investors other than ST Telemedia.”²⁶

²⁰ Third Amendment at 4.

²¹ “Mauritius Company” apparently is a placeholder name for an entity not yet named or formed, and with no designated principal place of business, officers or directors. Mauritius, an independent member of the British Commonwealth, is a tax haven located in the Indian Ocean east of Madagascar.

²² Neither Mauritius Company nor STT Communications Limited was part of the proposed ownership of New GX in the Original Transaction. See Original Application at Attachment F.

²³ Third Amendment, Attachment D. ST Telemedia, STT Communications Limited, Singapore Technologies Pte Ltd., and Temasek Holding (Private) Limited all are Singapore companies. *Id.*

²⁴ See Section 214 Transfer Application at 7. For reasons not stated by the Applicants, the “Corporate Organizational Charts” in Attachment D to the Third Amendment do not include the Government of Singapore.

²⁵ Third Amendment at 4 and Attachment D. All reported interests are subject to dilution due to a contemplated issuance of stock options to future New GX management, in an amount up to 8% of the equity of New GX. Third Amendment at 4.

²⁶ *Id.* at 3 n.6.

ST Telemedia also will control corporate governance and operational matters. ST Telemedia will nominate eight of the ten directors of the Board of Directors of New GX; those directors will serve as Chairman of the Board and of the Audit, Compensation, Executive, and Nominating Committees, and will constitute a majority of those Committees.²⁷ Board actions will be taken by majority vote.²⁸ ST Telemedia thus is proposed to hold *de jure* and *de facto* control of the licensee subsidiaries.

IV. THE NEW TRANSACTION EXCEEDS STATUTORY FOREIGN OWNERSHIP LIMITS

GX subsidiary Global Crossing North American Networks, Inc. (“GCNAN”) holds common carrier radio licenses issued under Title III of the Act that are the subject of the Wireless License Transfer Application. In connection with the Original Transaction, the Applicants sought a ruling that the transfer of control of the holders of those licenses to New GX, with Hutchison Telecom and ST Telemedia owning a combined 61.5% of New GX, was in the public interest, and asked the Commission to authorize Hutchison Telecom and ST Telemedia each to hold an unlimited indirect interest in GCNAN.²⁹ The Third Amendment, in contrast, proposes to transfer control to a new proposed transferee to be affirmatively controlled (61.5%) by ST Telemedia, and seeks authority for up to an additional 25% to be held by other foreign investors,³⁰ presumably including Hutchison.

²⁷ See *id.* at 4-5, Original Application at 6-9.

²⁸ Original Application at 8.

²⁹ *Id.* at 26.

³⁰ Third Amendment at 3 & n.6.

In connection with the Original Transaction, the Applicants asserted that, because Hutchison and ST Telemedia each would hold more than 25% in GCNAN, Section 310(b)(4) of the Act was implicated.³¹ In connection with the New Transaction, the Applicants continue to rely on Section 310(b)(4) and assert that “the fact that ST Telemedia is indirectly wholly owned by the Government of Singapore does not affect the Commission’s analysis.”³² Citing the Commission’s *VoiceStream/DT Order*³³ and *Lockheed/Telenor Order*,³⁴ the Applicants claim that the Act and Commission precedent make no distinction between indirect private foreign investment and indirect investment by foreign government-owned entities.³⁵ IDT firmly believes that the Act is to the contrary, and that the holdings in the *VoiceStream/DT Order* and *Lockheed/Telenor Order* should be revisited and no longer relied upon.

Section 310(a) of the Act prohibits “any foreign government or the representative thereof” from holding Title III licenses.³⁶ The Commission has held that “[i]f a foreign government or the representative thereof has either *de facto* or *de jure* control of the license, it would be deemed to hold the license” in violation of Section 310(a) of the Act.³⁷ This straightforward interpretation of Section 310(a) has been applied by the Commission more

³¹ *Id.* at 25.

³² Third Amendment at 8.

³³ *In re VoiceStream Wireless Corporation, et al., Transferors and Deutsche Telekom AG, Transferee, Memorandum Opinion and Order*, 16 FCC Rcd 9779 (2001) (“*VoiceStream/DT Order*”).

³⁴ *In re Lockheed Martin Global Telecommunications, et al., Assignor and Telenor Satellite Mobile Services, Inc. et al., Assignee, Order and Authorization*, 16 FCC Rcd 22897 (2001) (“*Lockheed/Telenor Order*”).

³⁵ Third Amendment at 8-9, n.22.

³⁶ 47 U.S.C. § 310(a).

³⁷ *Orion Satellite Corp., Order*, 5 FCC Rcd 4937, 4939 n.26 (1990).

consistently than the precedent relied upon by the Applicants. For example, in the *INTELSAT Order*,³⁸ the Commission clearly stated its standard for reviewing applications that implicate Section 310(a): “the Commission applies a ‘control’ test that considers whether a foreign government or representative thereof exercises either direct *de jure* or *de facto* control over a licensee. Neither form of foreign government control is permissible under Section 310(a).”³⁹

Section 310(b)(4) prohibits the Commission from granting, or allowing the holding of, common carrier and certain other licenses to or by “any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.”⁴⁰ Historically, the Commission has applied Section 310(b)(4) to circumstances in which a foreign citizen, corporation or government sought, through a holding company, to obtain ownership interests in a licensee in excess of the 25% benchmark.⁴¹

Notwithstanding its prior conclusions concerning Section 310(a), the Commission stated in the *VoiceStream/DT Order* that “[i]nsofar as this case requires the Commission to resolve the relationship between the restrictions on foreign government ownership in section 310(a) and the provision providing for indirect foreign government ownership in section 310(b)(4), it is a matter

³⁸ *In the Matter of Applications of INTELSAT LLC*, 15 FCC Rcd 15460 (2000) (“*INTELSAT Order*”).

³⁹ *INTELSAT Order* at ¶48. See also *Starsys Global Positioning, Inc., Order*, 10 FCC Rcd 9392, 9393 (Int’l. Bureau 1995); *Alpha Lyracom d/b/a Pan American Satellite, et al., Order*, 8 FCC Rcd 376, 378 n.21 (Com. Car. Bur. 1992).

⁴⁰ 47 U.S.C. § 310(b)(4).

⁴¹ See, e.g., *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995), at ¶¶ 44-56.

of first impression for the Commission.”⁴² The Commission acknowledged that it found both the statute and the legislative history confusing,⁴³ but resolved the apparent conflict between the two provisions by concluding that Section 310(a) applies only to direct investments by foreign governments, while all “indirect” investments by foreign governments – whether controlling or not – are to be analyzed under the public interest standard of Section 310(b)(4).⁴⁴

The Commission thus read into Section 310(b)(4) a grant by Congress of authority to allow foreign government control of licenses – an authority that consistent Commission precedent had determined was not permitted under Section 310(a). In so doing, the Commission ignored the intent of then-current members of Congress,⁴⁵ many of whom today remain unconvinced that the Commission correctly resolved the issue in the *VoiceStream/DT Order*.⁴⁶

The more appropriate reading of the two provisions is that Section 310(a) addresses control by foreign governments, while Section 310(b)(4) addresses indirect ownership interests that do not result in control. Allowing foreign government control under Section 310(b) effectively nullifies Section 310(a). The Commission’s statement in the *VoiceStream/DT Order* regarding these provisions – that “[a]n interpretation of the statute that section 310(a) absolutely

⁴² *VoiceStream/DT Order* at ¶33.

⁴³ *Id.* at ¶¶ 45-46.

⁴⁴ *Id.* at ¶48.

⁴⁵ See, e.g., IB Docket No. 00-187, Letter from Sen. Hollings and Rep. Dingell to the Honorable Michael K. Powell, March 7, 2001 at 2 (“[T]he question of foreign government ownership of U.S. telecommunications licenses is one of first impression before the Commission. As you also know, the Commission’s Foreign Participation Order (FPO) was based on a Clinton Administration initiative that was neither submitted to, nor approved by, Congress. To approve a transaction by relying on the FPO and the underlying executive agreement *without Congressional approval* would be the height of agency activism.” *Id.* (emphasis in original)).

⁴⁶ See, e.g., Letter from Sen. Conrad Burns, Chairman, Senate Committee on Commerce, Science and Transportation and Sen. Ernest F. Hollings, Senate Committee on Commerce Science and

(footnote continued to next page)

prohibits indirect control of a licensee corporation under the structure described in section 310(b)(4) therefore requires both reading section 310(a) to cover a situation (indirect control) that it does not expressly address, and reading section 310(b)(4) not to cover a situation (ownership of a holding company that also constitutes indirect control of the licensee) that is within its express terms” – contorts prior straightforward interpretations of these provisions beyond recognition. It is no stretch to interpret – as the Commission did prior to the *VoiceStream/DT Order* – Section 310(a)’s prohibition on a foreign government or its representative holding a license to encompass control. Control always is the ultimate inquiry in the Commission’s determination of whether to allow a particular proposed transferee to hold a radio license. Conversely, only by misreading the statute is it possible to interpret Section 310(b)(4) – which merely grants the Commission discretion to permit the ownership or voting of stock by a foreign government in a holding company that controls a licensee – as giving the Commission authority to permit a foreign government to wholly own and affirmatively control the holding company that in turn controls a licensee.

To the extent Section 310(b)(4) addresses control, it is the control held in a licensee by “any other corporation” – not control held by a foreign government. Section 310(b)(4) thus does not allow, absent a public interest finding, a foreign government or its representative to own or vote more than 25% of the capital stock of such “other corporation”. Twenty-five percent was a benchmark, beyond which Commission analysis and approval was required, and nothing in the statute or the legislative history suggests that controlling interests by foreign governments would

(footnote continued from previous page)

Transportation, May 15, 2003 (the New Transaction “raises questions about whether approval would be possible in view of statutory limits on foreign ownership set forth in Sections 310(a) and (b)” of the Act.

be permitted.⁴⁷ As the Commission implicitly conceded in *VoiceStream/DT*, the language of Section 310(b)(4) makes no reference to “control” by a foreign government.⁴⁸ The Commission, however, misinterpreted the provision as allowing the Commission to permit such control.

The Applications clearly raise issues of control by a foreign government. In the Original Application, the Applicants stated unequivocally that “ST Telemedia is ultimately owned and controlled by the Government of Singapore.”⁴⁹ In describing the New Transaction, however, the Applicants merely state that they “understand that the Government of Singapore exercises no control over ST Telemedia’s commercial strategy or activities and holds no veto right or ‘golden share’ in the company.”⁵⁰

Although it appears certain that the Government of Singapore possesses both *de facto* and *de jure* control of ST Telemedia and intervening entities, the Applicants have not disclosed sufficient information for the Commission or interested parties to confirm the Applicants’ limited “understanding” of their ultimate parent, or to determine the present or future nature and extent of control exercised over ST Telemedia and the licensee subsidiaries by the Government of Singapore – or, for that matter, by any of its affiliates, including Mauritius Company, STT Communications Limited, Singapore Technologies, Temasek, or Singapore Telecommunications Ltd. (“SingTel”), which is the dominant operator in Singapore and also owned by the

⁴⁷ See H.R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 48-49, Statement of the Managers on the Part of the House, reprinted in A Legislative History of the Communications Act of 1934 (M. Paglin, ed.), at 780-81.

⁴⁸ *VoiceStream/DT Order* at ¶39.

⁴⁹ Original Application at 19.

⁵⁰ Third Amendment at 9.

Government.⁵¹ Likewise, at this time it cannot be determined whether or not a “representative” of the Government of Singapore may possess control.⁵²

The Applicants also imply that questions of foreign government control are not relevant because the Government of Singapore “has agreed to establish a plan to divest its majority share in ST Telemedia.”⁵³ As explained below, Singapore has not firmly committed to any divestiture plan, and its apparent agreement to create such a plan should be given no weight.

In sum, the Applications and the Third Amendment are wholly inadequate for the Commission to determine, in the first instance, who will control the licensees and how that control will be exercised. The Commission cannot make determinations on issues of corporate control, foreign ownership interest, and the public interest based on such an incomplete record. At the very least, the Applicants should be required to supplement the record and, should the record as so supplemented confirm that the Government of Singapore would in fact control the licenses, the Commission should conclude, pursuant to Section 310(a) of the Act, that such control is not permitted.⁵⁴

⁵¹ A *de facto* control determination is based on a case-by-case analysis of the totality of the circumstances. *INTELSAT Order* at ¶50.

⁵² In *VoiceStream/DT*, the Commission rejected arguments that an entity is a “representative” of a foreign government if the government exercises *de facto* control over that entity. *VoiceStream/DT Order* at ¶47. *INTELSAT* and prior cases interpreting Section 310(a) as requiring an analysis of a foreign government’s control over licenses did not expressly find a link between control and “representative” status. Those decisions thus were not inconsistent with Commission decisions construing “representative” to apply to “individuals ‘acting on behalf of’ or ‘in conjunction with’ the foreign entity.” *Id.* (citing *QVC Network, Inc., Memorandum Opinion and Order*, 8 FCC Rcd 8485, 8490-91 (1993), *et al.*).

⁵³ *Id.*

⁵⁴ Even if the Commission determines that the proposed levels of foreign government ownership are to be reviewed under Section 310(b)(4), it cannot carry out its public interest analysis without substantially more information about the nature and extent of the Government of Singapore’s control than the Applicants have provided to date. In any event, as shown in Section V below, the Applicants have not satisfied their burden of proving that the New Transaction is in the public interest.

V. THE RECORD DOES NOT SUPPORT A FINDING THAT THE PUBLIC INTEREST WOULD BE SERVED BY PERMITTING THE PROPOSED FOREIGN CONTROL

A. Standard of Review

The Commission recently set forth the standard of review it applies to proposed transfers of control such as that proposed by the New Transaction.

In considering the transfer of control applications, the Commission must determine, pursuant to section 214(a) and section 310(d) of the Act, whether the proposed transfers of control will serve the public interest. In addition, because of the foreign ownership interests presented in this case, we also must determine whether the proposed transfer of control ... is permissible under the foreign ownership provisions of section 310(b)(4).⁵⁵

This standard of review applies to the Section 214 License Transfer Application and the Cable Landing License Transfer Application (and, to the extent not subject to Section 310(a) of the Act, the Wireless License Transfer Application).

The Applicants mistakenly assert that the Commission should apply to the New Transaction the rebuttable presumption articulated in the *Foreign Participation Order*.⁵⁶ However, the Commission clearly stated in the *Foreign Participation Order* that “acquisition of a *controlling interest* would be reviewed under our merger analysis that examines in detail the

⁵⁵ *Vodafone Americas Asia Inc. and Globalstar Corporation*, 17 FCC Rcd 12849, 12854 (2002) (“*Vodafone/Globalstar Order*”).

⁵⁶ In the *Foreign Participation Order*, the Commission established, as a factor in its public interest analysis, the rebuttable presumption that applications for Section 214 authority, applications to land and operate submarine cables, and applications for common carrier licenses filed by carriers from WTO Member countries would not pose competitive concerns that would justify denial of an application. *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891, 23913, ¶50 (1997) (“*Foreign Participation Order*”).

competitive impact of the proposed merger.”⁵⁷ Consequently, the Commission, in addition to its public interest analysis under Sections 214 and 310 of the Act, must undertake a merger analysis in order to properly assess the competitive impact of the New Transaction.

To conduct its analysis, the Commission must consider the likely competitive and anticompetitive effects of the proposed transfers of control, any other public interest benefits and the prospect of national security, law enforcement, foreign policy or trade policy concerns.⁵⁸ Through this analysis, the Commission must balance the potential public interest harms and benefits that may result from the proposed transfer.⁵⁹ Because the New Transaction involves the acquisition of a domestic carrier by a foreign entity, the inquiry also must consider how the transaction will affect competitive conditions on the affected international routes.⁶⁰

The Commission has established that its merger analysis is based on determinations of market power as well as on antitrust laws.⁶¹ The New Transaction would result in the removal of GX as an independent competitor in Southeast Asia and elsewhere, and in the consolidation of control of much of the undersea cable capacity in Southeast Asia by dominant carriers in that region. Because of this increased market concentration, the Commission must consider in its

⁵⁷ *Id.* at n.85 (emphasis added). Thus, the same concerns and analysis should not be present in a transaction that does not involve affirmative control by ST Telemedia and its government-owned affiliates.

⁵⁸ *Vodafone/Globalstar Order* at ¶15.

⁵⁹ *AT&T Corp., British Telecommunications, plc, VTC Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited, Applications for Grant of Section 214 Authority, Modifications of Authorizations and Assignments of Licenses in Connection With the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, Memorandum Opinion and Order*, 14 FCC Rcd. 19140, 19147, ¶15 (1999) (“*AT&T/BT Order*”).

⁶⁰ *See Vodafone/Globalstar Order* at ¶54.

⁶¹ *AT&T/BT Order* at ¶16.

antitrust analysis the horizontal effect of the New Transaction and the opportunity for the proposed transferees to exercise market power by raising prices above competitive levels.⁶²

The New Transaction also will enhance ST Telemedia's and its affiliates' market power and ability to control its competitors' costs in upstream and final product markets.⁶³ The acquisition of an important international carrier and builder of submarine cable systems by a large, government-owned entity affiliated with dominant carriers in Southeast Asian markets warrants Commission investigation of the potential vertical effects on competition.

Furthermore, the Applicants must demonstrate to the Commission, not merely that the merger will not "substantially ... lessen competition ... [or] ... tend to create a monopoly,"⁶⁴ but that the transaction in fact "will enhance competition."⁶⁵ In addition, the Commission must consider whether any efficiencies or other public interest benefits are likely to result from the proposed transfers of control.⁶⁶ As a result, the Applicants bear the burden of affirmatively proving that the New Transaction will *benefit*, and not merely fail to harm, the public interest.

⁶² See *Merger of MCI Communications Corporation and British Telecommunications plc*, Memorandum Opinion and Order, 12 FCC Rcd. 15351, 15369, ¶37 (1997) ("MCI/BT Order"). See also United States Dept. of Justice Antitrust Division, and Federal Trade Commission, *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41552 (1992); United States Dept. of Justice and the Federal Trade Commission, *Revision to Horizontal Merger Guidelines* (1997) ("Horizontal Merger Guidelines").

⁶³ MCI/BT Order at ¶39; see Sections V.C.3 and V.C.5(v), *infra*.

⁶⁴ 15 U.S.C. § 18; MCI/BT Order at ¶¶ 3, 28.

⁶⁵ MCI/BT Order at ¶3.

⁶⁶ See, e.g., *VoiceStream/DT Order* at ¶17.

Finally, as previously noted, the Commission must consider whether the New Transaction will present any national security, law enforcement, foreign policy or trade policy concerns.⁶⁷

The Third Amendment does not provide the type or quantity of information necessary for the requisite thorough analysis of the impact on competition and the public interest raised by the New Transaction. The Applicants plainly have not met their burden of demonstrating that the New Transaction will benefit the public interest or increase competition, and just as plainly are not eligible for the presumption afforded by the *Foreign Participation Order*. The Applicants merely have made barebones assertions about the effect of the transaction on the U.S. telecommunications market and cited the commercial relationship between the United States and Singapore, claiming that there are no “exceptional circumstances that justify not applying the presumption that no threat to competition exists.”⁶⁸ These statements are inadequate and ignore the obvious: the New Transaction would result in the wholesale transfer of control of Commission licenses to an entity that is affiliated with carriers possessing market power in foreign markets, themselves affiliated with a foreign government – precisely the sort of “exceptional circumstances” that rebut the presumption and, in combination with numerous other factors, warrant denial of the Applications. Although the record lacks significant information that the Commission requires for purposes of its public interest analysis, as we demonstrate below, the record does reflect that the proposed transaction is likely to result in a substantial

⁶⁷ See *Foreign Participation Order* at ¶¶ 61-66.

⁶⁸ Third Amendment at 7-8.

decrease in competition and an opportunity for the Applicants to restrict output and raise prices on certain Southeast Asian routes.⁶⁹

B. Public Interest Considerations Dictate that the Applications Should Be Denied Because the New Transaction Threatens the Competitive Nature of World Telecommunications Markets and Raises Substantial National Security and Law Enforcement Concerns

As Commissioner Copps has noted, substantial control by a foreign government

represents a serious potential threat to competition, because of the fundamental difference between companies that operate in a free market and state-run industries that may act counter to free market forces. In order to meet the statutory requirement that transactions be in the public interest, the benefits of a transaction with such high foreign government ownership must be significant enough to overcome the potential harm to competition.

De jure control of U.S. licenses by a foreign government is a threat not only to competition, but also to the public interest. Such control threatens competition because companies controlled by foreign governments have many increased incentives and enhanced abilities to cross-subsidize their American licensee. These include the ability to channel revenues earned from monopoly services in home markets and to shift costs incurred by their US licensee to their customers who pay for monopoly services.⁷⁰

Commissioner Copps' well-founded concerns demonstrate the importance of the Commission's review of the Applications. As shown below, the New Transaction indeed poses a threat both to competition and the public interest. Moreover, the Applicants have provided no evidence of countervailing competitive benefits of the New Transaction, arguing simply that

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The Cable Landing License Transfer Application is not, as the Applicants have presumed, eligible for streamlined review. Submarine cable license applications filed by entities that are affiliated with foreign carriers based in WTO member countries may qualify for streamlined review under certain conditions, not present here. See *Review of Commission Consideration of Applications Under the Cable Landing License Act*, 16 FCC Rcd 22167, 22174, ¶12 (2001).

⁷⁰

Lockheed/Telenor Order, Statement of Commissioner Michael J. Copps.

maintaining GX as a going concern is sufficient justification to approve the New Transaction.⁷¹ That financial backing is not unique and cannot justify the decreased competition that would result.

1. ST Telemedia and its Affiliates Dominate Substantial Portions of the Southeast Asian Telecommunications Market.

As part of its public interest analysis under Section 214(a) of the Act, the Commission must consider whether New GX will be, or will be affiliated with, a foreign carrier that has market power on the foreign end of a U.S. international route that the transferee has authority to serve.⁷²

Through ST Telemedia and its affiliates, the Government of Singapore controls a substantial quantity of international submarine cables and network facilities and are the dominant operators in Singapore and Indonesia – an increasingly important telecommunications market that covers an area of the globe roughly as large as the United States.⁷³ As noted above, the Commission already has determined that ST Telemedia’s affiliate, Singapore Telecommunications Ltd. (“SingTel”),⁷⁴ is the dominant operator in Singapore, and that another ST Telemedia affiliate, PT Indosat,⁷⁵ is the dominant operator in Indonesia. Based on publicly-

⁷¹ Third Amendment at 6-7.

⁷² See *Vodafone/Globalstar Order* at ¶56.

⁷³ Analysts expect that the volume of telecommunications traffic between the United States and Asia will increase by 100% by 2014. Jean-Marie Beaufils, *Undersea Cable Technology in the Pacific*, *UnderWater Magazine*, Winter 1999. <<http://www.diveweb.com>>.

⁷⁴ ST Telemedia parent Temasek, wholly owned by the Singapore government, also owns a controlling interest in SingTel. Original Application at 12-13; Third Amendment at Attachment D.

⁷⁵ On December 15, 2002, ST Telemedia acquired 42% of Indonesia's second-largest telecommunications operator PT Indonesian Satellite Corp (Indosat). IT Asia One, *ST Telemedia bags Indosat with \$1b bid*, Shoeb Kagda, Dec. 16, 2002, <http://it.asia1.com.sg/newsdaily/news001_20021216.html>. See n.16, *supra*.

available information, it appears that ST Telemedia affiliates, including SingTel Opticom, control at least six large undersea cable systems serving Southeast Asia; these systems provide the majority of submarine cable access to Singapore.⁷⁶ Thus, the proposed combination of the GX assets with SingTel would result in ST Telemedia and its affiliates controlling the largest amount of international connectivity in the Asia Pacific Region and dominating two major telecommunication markets in that region.⁷⁷

2. *Control of the Licenses and Assets by ST Telemedia and Its Affiliates Could Substantially Harm Competition by Concentrating the Ownership of Important Undersea Cable Systems Interconnecting the United States and Southeast Asia.*

The New Transaction threatens to chill competition in the Southeast Asia market. GX currently controls five undersea cable systems in the Pacific region.⁷⁸ ST Telemedia affiliate SingTel appears to control at least six major undersea systems serving that market.⁷⁹ The common control and combination of the assets of the two entities will effectively eliminate a competitor to SingTel for cable system capacity in Southeast Asia. In addition, the combination would result in ST Telemedia and its affiliates gaining partial or complete control of at least 11

⁷⁶ See Major Submarine Cable Projects in Asia, Paul Budde, Submarine Telecoms Forum, Issue 8, May 2003, at <<http://www.subtelforum.com>>.

⁷⁷ *Id.* See also Pioneer Consulting, LLC, Worldwide Submarine Fiber Optics 2001 Report, 1-10.

⁷⁸ See Attachment A hereto, Chart of Global Crossing and SingTel Holdings. Through its former subsidiaries Asia Global Crossing and Pacific Crossing, GX previously controlled East Asia Crossing ("EAC"), a submarine system connecting Japan, Hong Kong, Taiwan, Korea, Singapore, Malaysia, the Philippines and China, and Pacific Crossing ("PC-1"), a cable system between the U.S. and Japan. EAC has been acquired by the Chinese-government controlled China Network Communications ("China NetCom") and PC-1 has been acquired by Pivotal Projects. Major Submarine Cable Projects in Asia, *supra* n. 76. China NetCom company information is available at <<http://www.chinanex.com>>. The Commission should, of course, consider competitive effects of ongoing commercial and other relationships between these former GX subsidiaries and New GX.

⁷⁹ See Attachment A. See also International Cable Protection Committee Cable Database, <<http://www.iscpc.org>>; Major Submarine Cable Projects in Asia, *supra* n.76.

major undersea cable systems serving Southeast Asia.⁸⁰ Of those 11 cable systems, six provide access to Singapore, four provide access to Japan, and four provide access to the United States.⁸¹ The consolidation of control of the combined transmission capacity of these assets would substantially increase the level of concentration in the Southeast Asian market in favor of entities controlled by the Government of Singapore. This horizontal consolidation is likely to harm competition and result increased prices for transmission capacity in Southeast Asia.

3. *ST Telemedia Affiliate SingTel Already Is Engaged in Anticompetitive Behavior*

SingTel, the dominant local carrier in Singapore, currently charges international traffic termination rates that are five to six times higher than carriers terminating traffic in other major markets.⁸² “‘In most of Asia, and especially in Singapore, the telecom industry is being charged exorbitantly high prices’ for ... essential services, says Carol Ann Bischoff, Washington-based general counsel for the Competitive Telecommunications Association.... ‘Asia is woefully out of step with the rest of the world.’”⁸³

In response to complaints lodged by U.S trade officials and adversely affected international carriers, the Infocomm Development Authority (“IDA”), Singapore’s telecommunications regulator and a key agency within the Government of Singapore, announced

⁸⁰ See Attachment A.

⁸¹ *Id.* The combined transmission capacity of SingTel’s six submarine cables that connect to Singapore, exclusive of the i2i Cable, is approximately 100 Gb/s. SingTel also is a minority owner of APCN-2, which has a landing point in Singapore and an initial transmission capacity of approximately 160 Gb/s. APCN-2 was constructed by GX subsidiary Global Marine, Ltd. See International Cable Protection Committee Cable Database, <<http://www.iscpc.org>>; Major Submarine Cable Projects in Asia, *supra* n. 76. See also http://www.globalmarinesystems.com/site/GN_Installation_APCN2.htm.

⁸² Phillip Day, Telecom Battle Heats Up in Asia as Carriers Say Prices Not Fair, The Wall Street Journal Online, May 22, 2003. <http://online.wsj.com/article_print/0,,SB105328488338593900,00.html>.

⁸³ *Id.*

that it is studying the issue,⁸⁴ but did not commit to intervene in the matter. Certain, however, is the fact that SingTel's dominant position in the Singapore market and ownership by the Singapore government allow it to continue without competitive challenge the imposition of high termination rates on international carriers seeking to provide service to Southeast Asia.

Although the United States-Singapore Free Trade Agreement ("USSFTA") signed last month may provide some relief to U.S.-based international carriers that are harmed by SingTel's high termination rates, that outcome is far from certain. Congress has not yet approved the USSFTA and, even if Congress approves the agreement, the USSFTA requires only that termination rates should be "reasonable [and] nondiscriminatory" as compared to international norms.⁸⁵ Although trade talks intended to create that result continue, it is not clear that the outcome will be fair to U.S. carriers. Recent comments from IDA and SingTel suggest resistance to rate cuts.⁸⁶ Mr. Lim Chuan Poh, SingTel's executive vice president for corporate business, recently declared "[i]f we are expensive, then they should be in the business [of building leased-line "last-mile" circuits]."⁸⁷ However, building redundant last-mile facilities when there is otherwise available – albeit overpriced – termination capacity on existing circuits does not make economic sense for carriers of international telecommunications traffic. The financial and logistical challenges of building last-mile termination facilities in foreign markets

⁸⁴ Phillip Day, Singapore Regulator May Force Singtel to Open Access to Cables, The Wall Street Journal Online, Jun. 3, 2003. <http://online.wsj.com/article_print/0,,SB105328488338593900,00.html>.

⁸⁵ USSFTA, Article 9.2.

⁸⁶ See Phillip Day, Telecom Battle Heats Up in Asia as Carriers Say Prices Not Fair, The Wall Street Journal Online, May 22, 2003. <http://online.wsj.com/article_print/0,,SB105328488338593900,00.html>.

⁸⁷ *Id.*

become insurmountable when there is an entrenched and government-owned incumbent with the power to arbitrarily discount its termination charges below marginal cost in order to prevent competitors from entering its market. Furthermore, in Singapore, even the “competitive” local carriers are merely affiliates of SingTel, the incumbent carrier – which is, of course, owned by the Singapore government. Consequently, the eventual availability of rational, market-based termination rates for Singapore cannot be assumed.⁸⁸

The New Transaction also could lead to competitive harm in vertical markets. Through their control of New GX, ST Telemedia and its government-owned affiliates would be able to coordinate the maintenance of high termination rates for Singapore and Indonesia. ST Telemedia is unlikely to be concerned about termination rates that it pays to its affiliate, SingTel – its settlement payments would merely be going from one corporate pocket to another. As a result, ST Telemedia’s affiliates would have even less incentive to decrease termination rates in Singapore and Indonesia, as the high termination rates imposed on non-affiliated carriers would merely drive more traffic to ST Telemedia’s New GX. By virtue of being affiliated with SingTel through common parent entities, New GX would not be impaired by such high termination rates; furthermore, the Government of Singapore would have little incentive to exert regulatory pressure in favor of lower termination rates. Consequently, rather than “enhancing competition” by “ensuring the continued viability of the Global Crossing Network,”⁸⁹ there is a substantial risk that permitting ST Telemedia to gain control of New GX could cause substantial harm to competition.

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Phillip Day, Telecom Battle Heats Up in Asia as Carriers Say Prices Not Fair, *The Wall Street Journal Online*, May 22, 2003. <http://online.wsj.com/article_print/0,,SB105328488338593900,00.html>.

⁸⁹

Original Application at 21.

4. *The Privatization of ST Telemedia Does Not Appear to Be Imminent*

Implicitly acknowledging that government ownership of ST Telemedia is a critical issue, the Applicants state that the Government of Singapore reports that it has “agreed to establish a plan to divest its majority share in ST Telemedia.”⁹⁰ However, the Applicants have provided no information with regard to a timeline or other important details regarding such a plan. During a recent hearing on the USSFTA, a Commerce Department official acknowledged that Singapore’s purported commitments to privatize SingTel and ST Telemedia – which are contained in a side letter to the USSFTA⁹¹ – have no practical effect.⁹² The mere promise of an “agreement” to “establish a plan” is not a sufficiently concrete basis on which the Commission can evaluate the possible benefits or harms of the New Transaction. Even if the Government of Singapore does “establish” such a plan, there is no evidence that it will execute that plan or that it ultimately will agree with the Commission’s policies or benefit the public interest. At a minimum, the Commission should suspend its review of the applications pending the adoption and release by the Government of Singapore of a detailed divestiture plan containing specific implementation benchmarks.

5. *The Proposed Transaction Raises Substantial and Unprecedented National Security and Law Enforcement Concerns that Must Be Addressed By the Commission and Executive Agencies*

⁹⁰ Third Amendment at 9.

⁹¹ See Third Amendment at n.23.

⁹² Testimony of Michelle O’Neill, Deputy Assistant Secretary for Information Technology Industries, U.S. Dept. of Commerce, before the House Committee on Energy and Commerce’s Subcommittee on Commerce, Trade, and Consumer Protection, “Trade in Services and E-Commerce: The Significance of the Singapore and Chile Free Trade Agreements, May 8, 2003.

- (i) The New Transaction Could Result in Foreign Government Control of Submarine Cable Facilities that Are Critical to U.S. Government and Private Communications.

In 1996, the President identified eight critical infrastructures, the loss of any of which would have a debilitating impact on the defense or economy of the United States.⁹³ One of the eight critical infrastructures is Telecommunications.⁹⁴ Similarly, Congress, in the USA Patriot Act of 2001 defined “critical infrastructure” as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”⁹⁵ Thus, the submarine cables and cable landing licenses held by GX subsidiaries are a critical part of our Nation’s telecommunications infrastructure. According to the National Infrastructure Protection Center, submarine cable systems and landing points are prime targets for terrorists seeking to harm the United States, and damage to a submarine system would result in substantial economic and social losses.⁹⁶ Because these cables are increasingly vital to global security and the global economy, disruption or illicit access to submarine cable systems could make available to unknown parties a substantial quantity of sensitive private, commercial and military information.

If the New Transaction is approved, the Government of Singapore, through the FCC-licensed subsidiaries, will control an important domestic telecommunications network and vast

⁹³ Executive Order 13010, Critical Infrastructure Protection, July 15, 1996
<http://www.fas.org/irp/offdocs/eo13010.htm>.

⁹⁴ *Id.*

⁹⁵ USA Patriot Act of 2001, 115 Stat. 272, § 1016(e).

⁹⁶ Rear Admiral Jim Plehal, PowerPoint Presentation, National Infrastructure Protection Center, <www.nipc.gov>.

quantity of international submarine cables and telecommunications facilities.⁹⁷ Currently, GX, directly or through its subsidiaries, controls complete or partial interests in at least 14 undersea cable systems.⁹⁸ GX and its subsidiaries provide Internet and high-speed telecommunications services to over 200 cities in 27 countries spanning five continents.⁹⁹ Through its Global Marine subsidiary, GX owns the largest fleet of cable laying and maintenance vessels in the world and services a substantial portion of the world's undersea cable miles.¹⁰⁰ GX affiliate GT Landing II Corp. shares with Level 3 the 3,700-mile Atlantic Crossing 1/Yellow cable system, which links North America and Europe.¹⁰¹ At an initial throughput of 320 gigabits per second ("Gb/s") and an ultimate capacity of 1.28 terabits per second ("Tb/s"), the system has more capacity than any other transatlantic cable system.¹⁰² In addition, through its Global Crossing Ltd. subsidiary, GX owns an interest in the Japan-US Cable Network, which link points in the mainland United States and Hawaii with points in Japan.¹⁰³ South American Crossing ("SAC")¹⁰⁴ and Pan American

⁹⁷ These subsidiaries include Global Crossing Holdings USA, Inc., which holds a 100% controlling interest in GC Pacific Landing Corp., GT Landing Corp., MAC Landing Corp., and PAC Landing Corp.; Global Crossing North America, Inc., which holds a 100% controlling interest GT Landing Corp. II. *See* Attachment A.

⁹⁸ *Id.*

⁹⁹ Global Crossing Ltd., U.S., SEC Form 10-K, December 2000.

¹⁰⁰ Nancy Weil, IDG News Service, Global Crossing Completes C&W Global Marine Deal, July 6, 1999. <<http://www.idg.net>>. In 1999, there were over 500,000 cumulate kilometers of undersea cable installed worldwide. Tim Branton, Director of Business Development, Global Marine Systems Ltd., The Role of Submarine Cables in Next Generation Communications, <www.globalmarinesystems.com>.

¹⁰¹ *See In the Matter of Level 3 Landing Station, Inc. and GT Landing II Corp., Application for Modification of License to Land and Operate in the United States a Private Fiber Optic Submarine Cable System Extending Between the United States and the United Kingdom*, SCL-MOD-20000511-00018, DA 00-2569 (rel. Nov. 9, 2000).

¹⁰² Press Release, Level 3 Activates Transatlantic Cable, Dec. 1, 2000, <<http://www.apstreet.com/pr.a.taf/idpr,14230>>. By way of comparison, as of early 2003 the aggregate total of lit transatlantic capacity was 2.34 Tb/s. Telegeography, Inc. 2003 Report at 11.

¹⁰³ *See In the Matter of Frontier Communications Services, Inc. Application for Transfer of Control of a Cable Landing License from Frontier Corp. to Global Crossing Ltd., Order and Authorization*, File No.

(footnote continued to next page)

Crossing (“PAC”),¹⁰⁵ two of five new networks serving Latin America, also are part of the GX network.¹⁰⁶

- (ii) The Proposed Transaction Would Place a Significant Amount of the Nation’s Critical Infrastructure Under the Control of a Foreign Government that May Not Cooperate with United States National Security and Law Enforcement Activities.

As early as the 1970s, the ability to tap into undersea cables was an important intelligence asset and a factor in national security affairs.¹⁰⁷ Although national security and law enforcement agencies can tap into fiber optic undersea cables, doing so is made very difficult due to the depths at which cables are buried. As a result, many international carriers permit U.S. security and law enforcement agencies to obtain access to traffic for such legitimate purposes.¹⁰⁸ Although security and law enforcement agencies may not be restricted in their access to domestic cable landing sites and transmission facilities to be transferred to New GX, substantial problems may arise with respect to cables and facilities located overseas and which are owned and

(footnote continued from previous page)

SCL-T/C-19990914-00020, DA 00-568 (rel. Mar. 15, 2000); *In the Matter of AT&T Corp., Com Tech International Corp., Frontier Communications Services, Inc., et al. Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan, Cable Landing License*, File No. SCL-LIC-19981117-00025, FCC 99-167 (rel. July 9, 1999).

¹⁰⁴ SAC can provide throughput up to 80 GB/s over 16,000 km of cable forming a “ring” around much of South America. *Id.*

¹⁰⁵ PAC can provide 40 Gb/s of throughput, has a total length of 9,500 km and runs from Venezuela through Panama to California. *Id.* See also Global Crossing Network Completion Advances with Activation of Eastern Ring in Germany, May 25, 2000 <<http://www.globalcrossing.com>>.

¹⁰⁶ Until 2000, only four undersea cables (Maya-1, Pan-American, Atlantis-2 and Americas-2) served Latin America. Dr. Saul Hahn, Co-ordinating Committee for Intercontinental Research Networking, Annual Meeting, Regional Updates, June 8-9, 2001. Since 2000, four firms (GX, Emergia, 360Networks and New World Networks) have undertaken projects serving the Latin American market.

¹⁰⁷ See Matthew Carle, Operation Ivy Bells, Military.com <http://www.military.com/Content/MoreContent1/?file=cw_f_ivybell>.

¹⁰⁸ IEEE Spectrum Online, Jan. 2002, Making Intelligence Smarter, <<http://www.spectrum.ieee.org>>.

controlled by foreign entities.¹⁰⁹ As a result, the proposed transfer of control to ST Telemedia could create problems for United States agencies that have a legitimate interest in obtaining access to international traffic on cables that do not have landing points in the United States.

- (iii) The Commission Cannot Adequately Perform Its Analysis Before Receiving the Executive Agencies' Findings Regarding National Security Issues and the Comments of Interested Parties on Those Findings.

The Applicants note that the proposed transaction is subject to the provisions of Section 271 of the Defense Production Act¹¹⁰ and that the Department of Justice and the Federal Bureau of Investigation are conducting an independent review of the matter.¹¹¹ The Applicants have asked the Commission to proceed with its review of the proposed transaction but to defer dispositive action until the Commission receives notice from the Executive Branch regarding national security or law enforcement issues.¹¹²

The Commission's rules governing the granting of licenses¹¹³ under the Cable Landing Licensing Act of 1921¹¹⁴ and Executive Order¹¹⁵ require a review of the New Transaction by the Defense Information Systems Agency ("DISA"). DISA, part of the Department of Defense, is a combat support agency responsible for planning, operating and supporting command, control, communications and information systems for the U.S. government. The DISA review provides

¹⁰⁹

Id.

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50 U.S.C. App. § 2170.

¹¹¹

Third Amendment at 10.

¹¹²

Id. at 10-11.

¹¹³

See 47 C.F.R. §1.767(j).

¹¹⁴

Pub. Law No. 8, 67th Cong., 42 Stat. 8 (1921); 47 U.S.C. §§ 34-39.

¹¹⁵

Executive Order No. 10530 §5(a) (May 10, 1954).

the DOD with an opportunity to inform the Commission of any national security concerns that it may have.

The Commission should not approve the applications without first establishing that the Executive Branch has satisfied its national security and law enforcement concerns relating to the proposed transaction. Furthermore, the Commission's responsibility would not be fulfilled if it were to conduct its public interest analysis without undertaking a thorough and independent analysis of the national security, law enforcement, foreign policy and trade policy concerns raised by the transaction.¹¹⁶ The Commission is obliged to "obtain approval from the State Department and to seek advice from other Executive Branch agencies *before* granting a cable license."¹¹⁷

Consequently, the Commission should not undertake its public interest analysis before receiving from the Executive Branch a clear, written communication regarding the national security and law enforcement matters involved in the New Transaction and obtaining public comment on the Executive Branch's findings. The Applicants' request that the Commission expedite its public interest analysis without such data¹¹⁸ clearly undermines the Commission's established process for this aspect of its public interest analysis. Consequently, the Applicants' request that the Commission short-circuit the process and merely wait for a go/no go flag from the Executive Branch should be rejected.

¹¹⁶ In the *Foreign Participation Order*, the Commission noted the DOD and FBI's comments that "no presumption should be applied to national security issues.... [E]very application should be reviewed on its own facts, issues should be affirmatively resolved, and the FCC should defer to the Executive Branch's findings on national security issues." *Foreign Participation Order* at ¶¶ 60-61.

¹¹⁷ *Id.* at n.113.

¹¹⁸ Third Amendment at 10-11.

- (iv) GX's Global Marine Subsidiary Is an Important Competitive and Strategic, But Unregulated, Asset Which the Commission Must Account for in Its Review of the Proposed Transaction.

The Applicants have not addressed the competitive and national security implications of the change of control of GX's non-regulated assets and operations. In 1999, GX acquired Cable & Wireless Global Marine, a submarine cable and maintenance operation that was formerly a subsidiary of Cable & Wireless PLC, for \$885 million in cash and the assumption of outstanding debt.¹¹⁹ Renamed Global Marine Systems Ltd., ("Global Marine") this GX subsidiary is the largest firm of its kind – owning and operating 15 cable ships and 22 submersible vehicles, and responsible for more than one-third of the world's undersea cable mileage in operation as recently as 1999.¹²⁰

Global Marine is the only independent company able to offer comprehensive submarine cable planning, installation and maintenance services worldwide.¹²¹ Global Marine currently owns and operates a fleet that comprises nearly 25% of the major cables ships listed by the International Cable Protection Committee ("ICPC"), including the *Cable Innovator*, one of the world's largest cables ships with a cable capacity of 7500 tons.¹²²

Under the New Transaction, control of these assets would transfer to ST Telemedia. As a result, ST Telemedia not only would dominate much of the undersea cable capacity serving Southeast Asia, it also would own one of the most important potential suppliers of additional

¹¹⁹ Liane H. Labarba, Global Crossing Goes to Sea with C&W Deal, Telephony Online, May 3, 1999 <<http://telephonyonline.com>>.

¹²⁰ Nancy Weil, IDG News Service, Global Crossing Completes C&W Global Marine Deal, July 6, 1999. <<http://www.idg.net>>.

¹²¹ Company information, available at <<http://www.globalmarinesystems.com>>.

¹²² See <<http://www.iscpc.org>>.

capacity in that region. This aspect of the New Transaction presents a new and substantial vertical risk to competition, especially with respect to Southeast Asia. The record does not address this issue. However, the Commission must determine if ST Telemedia could and would use Global Marine's capabilities to further its dominance over telecommunications services in Southeast Asia or take unfair advantage of Global Marine's role as the vendor and maintenance provider for major cable systems worldwide.

- (v) It Would Be Difficult for the Commission or Any Executive Agency to Monitor the Activities of an Organization that Cannot Be Held Accountable to United States Laws.

The Applicants have asked the Commission to authorize New GX to accept equity or voting interests up to an additional 25% from "non-US investors other than ST Telemedia." The Commission should inquire further into this request, and should not grant it unless ST Telemedia is prohibited from assigning such interests in a manner that conflicts with the Commission's policies or to parties that would be found unacceptable if subjected to Commission and Executive Agency scrutiny at the time of such transaction.

ST Telemedia's acquisition of Indosat is a case where the company has acquired "a strategic asset with a role in safeguarding national secrets."¹²³ A number of Indonesian legislators have sought an inquiry into that transaction, complaining that key government officials received bribes to support ST Telemedia's bid for the Indonesian carrier. The United States has specific legislation, the Foreign Corrupt Practices Act, that bars American companies from engaging in illicit acts such as bribery of foreign officials.¹²⁴ The Commission similarly has an interest in

¹²³ Jakarta MPs Seek Probe on Indosat Deal, *The Straits Times* (Singapore), Jan. 4, 2003.

¹²⁴ 2 U.S.C. §§ 252-256.

ensuring that its licensees do not engage in acts that are contrary to U.S. policy. However, it is unlikely that the Commission could easily protect that interest with respect to a licensee that is not ultimately accountable to the laws of the United States.

VI. THE COMMISSION'S PROCESSING CLOCK ON THE NEW TRANSACTION SHOULD NOT YET BE RUNNING

The New Transaction seeks approval of a transfer of control to an entity that, until the filing of the Third Amendment on May 13, 2003, was known to the Commission in name only. The Third Amendment effectively constitutes a new application, for which the Commission should start a new processing timetable once the Applicants submit information sufficient for the Commission to make the competition and public interest analyses required under the Act.

The present record provides an insufficient basis on which to grant the applications; consequently, the applications should be dismissed or denied. Regardless of whether the Applicants re-file applications seeking consent to the transaction described in the Third Amendment, or the Commission allows the Applicants to supplement the Third Amendment, no action should be taken on any of the applications unless and until (1) the Applicants have provided substantial additional information demonstrating that the New Transaction serves the public interest, (2) all interested parties have been afforded an opportunity to address (and, with respect to Congress, it shall have provided explicit guidance to the Commission concerning) the issue of whether the proposed controlling interest by the Government of Singapore is consistent with the Communications Act; (3) the Government of Singapore has adopted and implemented a plan for the privatization of its telecommunications interests; and (4) all Executive Agency approvals have been obtained.

VII. CONCLUSION

WHEREFORE, the foregoing premises having been duly considered, IDT requests that the Commission dismiss or deny the applications for consent to transfer control of the licensed subsidiaries of Global Crossing Ltd. to GC Acquisition Limited, and deny the Petition for Declaratory Ruling associated with those applications.

Respectfully submitted,

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ATTACHMENT A

Global Crossing - Atlantic Region:

System	Capacity	Length	Countries
Atlantic Crossing 1 ("AC-1")	40 Gb/s	14,000 km	United Kingdom, Netherlands, Germany, United States
Yellow/Atlantic Crossing 2 ("AC-2")	320 Gb/s	8,000 km	United States, United Kingdom
Mid-Atlantic Crossing ("MAC")	20 Gb/s	7,500 km	United States, U.S. Virgin Islands
UK-Ireland	80 Gb/s	495 km	United Kingdom, Eire
Pan American Crossing ("PAC")	20 Gb/s	9,500 km	United States, Mexico, Panama, Venezuela, U.S. Virgin Islands
South American Crossing ("SAC")	1.28 Tb/s	16,000km	U.S. Virgin Islands, Brazil, Argentina, Chile, Peru, Columbia, Panama
Atlantic Express I and II			United States, Bermuda, United Kingdom
Bahamas Express Cable			United States, Bahamas

Global Crossing - Pacific Region:

System	Capacity	Length	Countries
Guam-Hawaii Cable			Guam, United States
Hawaii Express Cable	10 Gb/s		United States (mainland and Hawaii)
Orient Express Cable	10 Gb/s		Guam, Philippines, Hong Kong, China, Korea
Japan-U.S. Cable	40 Gb/s -- 640 Gb/s	21,000 km	United States, Japan
Asia Direct Cable	10 Gb/s		Canada, China, Japan, Korea

SingTel:

System	Capacity	Length	Countries
Asia Pacific Cable ("APC")	2x560 Mb/s	7516 km	Japan, Taiwan, Hong Kong Malaysia, Singapore
Asia Pacific Cable Network ("APCN")	5 Gb/s	12,083 km	Korea, Japan, Taiwan, Philippines, Hong Kong, Singapore, Indonesia, Australia
Southern Cross Cable Network	40 Gb/s	30,500 km	Australia, New Zealand, United States
Brunei-Singapore ("BS")	2x560 Mb/s	1,570 km	Brunei, Singapore
i2i Cable	8.4 Tb/s	10,800km	Singapore, Chennai, Mumbai
South-East Asia – Middle East – Western Europe 2 ("Se-Me-We 2")	2x560 Mb/s	10,000 km	Indonesia, Singapore, Sri Lanka, India, Djibouti
South-East Asia – Middle East – Western Europe 3 ("Se-Me-We 3")	2.5 Gb/s	10,000 km	(Segment 2) China, Hong Kong, Macau, Philippines, Brunei, Vietnam, Malaysia, Singapore
Asia Pacific Cable Network 2 ("APCN2")	640 Gb/s	19,153 km	Japan, Korea, China, Taiwan, Hong Kong, Malaysia, Singapore

CERTIFICATE OF SERVICE

I, Jennifer A. Short, hereby certify that a true and correct copy of the foregoing
Petition to Dismiss or Deny and Opposition to Petition for Declaratory Ruling was served
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